Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under The Strata Titles Act 1985)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-2370–12 OF 2016
TENGKU MAIMUN, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA
21 MARCH 2018

Civil Procedure — Appeal — Claim — Claim by registered proprietor of parcels of complex against management corporation — Claim for outstanding service charges, contribution to sinking fund, quit rent, insurance and late payment interest — Whether claimant proved claim for maintenance charges — Whether calculation for claim correct — Whether based on area or square foot instead of share unit — Strata Titles Act 1985 s 36(c)

The respondent ('the plaintiff') was a management corporation while the appellant ('the defendant') was the registered proprietor of seven parcels of the complex known as 'Plaza 393'. The plaintiff commenced an action at the High Court against the defendant for outstanding services charges, contribution to the sinking fund, quit rent, insurance and late payment interest. According to the plaintiff, the defendant's contribution to the management fund was RM0.15 per sqft and as from July 2012, the rate payable by the defendant was RM0.20 per sqft. The defendant argued that there no outstanding amount due to the plaintiff as the defendant had made the necessary payments. The defendant denied owing the plaintiff the amount claimed on the grounds that the plaintiff had no locus standi to claim against the defendant and in any event the claim was statute-barred. The High Court allowed the plaintiff's claim for the sum of RM10,420,461.50. Hence, the present appeal. The issues that arose for the court's determination were: (a) whether the plaintiff had proved its claim for the maintenance charges; and (b) whether the plaintiff's claim, based on area or square foot instead of the share unit which was in contravention of the Strata Titles Act 1985 ('the STA').

Held, allowing the appeal with costs:

(1) There was no compelling reason to depart from the finding of the trial judge. Since the defendant had never filed a written dispute with the plaintiff, the defendant had accepted the plaintiff's statements of account which were all deemed correct by the defendant. The conclusion of the trial judge was not perverse. It was consistent the statements of account. Having received the statements and having failed to deny or dispute them

despite the express requirement to do so, it was too late in the day for the defendant to now challenge the statements of account (see paras 56–57).

(2) It was clear, particularly by reference to s 36(c) of the STA, that there was an express statutory provision on how the maintenance charges should be calculated. It was the share unit that should form the basis of the proportion payable by the defendant of the maintenance charges. The levy based on the area or square foot was not provided for under the STA. Where the plaintiff's claim was illegal for being in contravention of the STA, estoppel could not be raised against the defendant notwithstanding the fact that the defendant's representative was present at the AGM and had not objected to the rate levied on the basis of square foot (see paras 72 & 75).

[Bahasa Malaysia summary

Responden ('plaintif') adalah sebuah perbadanan pengurusan manakala perayu ('defendan') adalah pemilik berdaftar tujuh petak kompleks yang dikenali sebagai 'Plaza 393'. Plaintif memulakan tindakan di Mahkamah Tinggi terhadap defendan bagi tunggakan caj perkhidmatan, sumbangan dana terikat, cukai pintu, insurans dan faedah bayaran lewat. Menurut plaintif, sumbangan defendan terhadap dana pengurusan adalah RM0.15 kaki persegi dan dari Julai 2012, kadar yang perlu dibayar oleh defendan adalah RM0.20 kaki persegi. Defendan menghujahkan tiada jumlah terhutang kerana defendan telah membuat kesemua bayaran. Defendan menafikan ada berhutang dengan plaintif sebanyak jumlah yang dituntut atas alasan plaintif tiada locus standi menuntut terhadap defendan dan dalam apa jua keadaan, tuntutan ini dihalang oleh had masa. Mahkamah Tinggi membenarkan tuntutan plaintif bagi jumlah sebanyak RM10,420,461.50. Oleh itu, rayuan ini. Isu-isu yang timbul bagi pemutusan mahkamah adalah: (a) sama ada plaintif telah membuktikan tuntutannya bagi caj penyenggelaraan; dan (b) sama ada tuntutan plaintif, berdasarkan kawasan atau secara kaki persegi dan bukan bahagian unit, bertentangan dengan Akta Hak Milik Strata 1985 ('AHMS').

Diputuskan, membenarkan rayuan dengan kos:

(1) Tiada alasan kuat untuk tidak bersetuju dengan dapatan hakim bicara. Oleh kerana defendan tidak pernah memfailkan pertikaian bertulis terhadap plaintif, defendan telah menerima penyata akaun plaintif yang dikatakan betul oleh defendan. Kesimpulan hakim bicara bukan tidak munasabah. Ia selaras dengan penyata akaun. Setelah menerima penyata dan gagal menafikan atau mempertikaikan kesemuanya walaupun terdapat keperluan nyata berbuat demikian, sudah terlambat buat defendan untuk kini mencabar penyata akaun tersebut (lihat perenggan 56–57).

(2) Jelas, khususnya dengan rujukan kepada s 36(c) AHMS, bahawa terdapat peruntukan statutori yang nyata tentang bagaimana caj penyelenggaraan harus dikira. Unit bahagian yang harus menjadi asas seimbang yang perlu dibayar oleh defendan bagi caj penyelenggaraan. Levi berdasarkan kawasan atau kaki persegi tidak diperuntukkan di bawah AHMS. Walaupun tuntutan plaintif tidak sah kerana bertentangan dengan AHMS, estopel tidak boleh dibangkitkan terhadap defendan walaupun fakta bahawa wakil defendan tidak hadir semasa AGM dan membantah kadar yang dilevikan berdasarkan kaki persegi (lihat perenggan 72 & 75).]

Notes

For cases on appeal in general, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 822–2054.

Cases referred to

Bank Bumiputra Malaysia Bhd v Emas Bestari Sdn Bhd and another appeal [2014] 2 MLJ 49, CA (refd)

Bank of New South Wales v Brown (Official Liquidator of Tom The Cheap (WA) Pty Ltd) (1983) 45 ALR 225, HC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

Chip Lam Seng Enterprise Bhd (in liquidation) v Euphoria Technologies Sdn Bhd & Anor [2017] 10 MLJ 796; [2017] 1 CLJ 195, HC (refd)

Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal [2009] 5 MLJ 322, FC (refd)

Connecticut Fire Insurance Co v Kavanagh [1892] AC 473, PC (refd)

D2D Management Services Sdn Bhd v Permata Alasan (M) Sdn Bhd [2014] MLJU 1905; [2014] 1 LNS 1486, HC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

Gulamabbas bin Mohamed Hussain v Bonus Properties Sdn Bhd & Anor [2015] MLJU 2046; [2015] 1 LNS 1073, HC (refd)

Haji Ali bin Haji Othman v Telekom Malaysia Bhd [2003] 3 MLJ 29; [2003] 3 CLJ 310, CA (refd)

Hean Sang Sdn Bhd v Kompleks Yik Foong Management Corporation [2015] MLJU 2344; [2015] 5 CLJ 93, HC (refd)

Hee Cheng v Krishnan [1955] 1 MLJ 103 (refd)

Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd [2017] 2 MLJ 697; [2017] 4 CLJ 1, FC (refd)

KCP Management Corporation v Potensi Naga Sdn Bhd [2013] MLJU 1633; [2013] 1 LNS 1030, HC (refd)

KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233; [1996] 2 CLJ 611, CA (refd)

KPM Khidmat Sdn Bhd v Tey Kim Suie [1994] 2 MLJ 627, SC (refd)
Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457, PC (refd)
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993, PC (refd)
Lim Geak Liang v East West UMI Insurance Bhd [1997] 3 MLJ 517, FC (refd)
Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281; [1992] 1 CLJ Rep 173, SC (refd)
Lim Tze Sian v Coverright Surface Malaysia Sdn Bhd [2017] 1 MLJ 418, CA (refd)
Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd [1971] 2 MLJ 161, FC (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)
MC Strata Title No 980 v Yat Yuen Hong Co Pte Ltd & Anor [1993] 1 SLR 555, CA (refd)
Mackt Logistics (M) Sdn Bhd v Malaysian Airline System Bhd [2014] 2 MLJ 518, CA (refd)
Malayan Banking Bhd v Wembley Industries Holdings Bhd [2012] MLJU 91; [2012] 5 CLJ 956, HC (refd)
Malaysia Land Properties Sdn Bhd & Anor v Simesilk Sdn Bhd [2014] MLJU 1904; [2014] 7 CLJ 1117, HC (refd)
Malaysia Land Properties Sdn Bhd v Waldorf & Windsor Joint Management Body [2014] 3 MLJ 467, CA (refd)
Medical Office Management Corporation Block v Parkway Life Malaysia Sdn Bhd [2015] 10 MLJ 332; [2015] 1 CLJ 264, HC (refd)
Mega Pascal Bhd v Tajukon Sdn Bhd & Ors [2011] MLJU 1450; [2011] 1 LNS 691, HC (refd)
Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 8 CLJ 212, FC (refd)
Perbadanan Pengurusan Endah Parade v Magnificient Diagraph Sdn Bhd [2013] 6 MLJ 343; [2014] 5 CLJ 881, CA (folld)
Sampo Materials (M) Sdn Bhd v Tenaga Nasional Bhd [2016] 1 MLJ 375, CA (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229, CA (refd)
Sri Wangsaria Management Corporation v Yeap Swee Oo @ Yeap Guan Cheng & Anor; Veronica Leong Poh Geok v Lim Cheng Poh [2009] MLJU 1461, HC (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)

Legislation referred to

Contracts Act 1950 s 24
Limitation Act 1953 ss 6, 6(1), 26(2)

Strata Management Act 2013
Strata Titles Act 1985 ss 4, 18, 36, 36(c), 41A, 45, 45(1), (3), (3)(b), (3)(c), (5), 52

Appeal from: Civil Suit No WA-22NCVC-160–03 of 2016 (High Court, Kuala Lumpur)

Lim Chee Wee (Manshan Singh and Lee Mei Hooi with him) (Skrine) for the appellant.
Steven Thiru (Aimee Liew, Au Yong Wai Nyan, David Ng Yew Kiat and Lim Zi-Han with him) (YH Teh & Quek) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] This is the appellant's ('the defendant') appeal against the decision of the High Court at Kuala Lumpur in allowing the respondent's ('the plaintiff') claim for the sum of RM10,420,461.50 (the judgment sum); interest at 10%pa on the judgment sum from 5 March 2016 until the date of judgment; interest at 5%pa on the judgment sum from the date of judgment until full settlement and costs.

THE BACKGROUND FACTS

[2] The plaintiff is a management corporation ('the MC') established on 21 April 2008 under the Strata Titles Act 1985 ('the STA'). The defendant is the registered proprietor of seven retail parcels ('seven parcels'), measuring 439,524.64 sqft of the complex known as Plaza 393 ('Plaza 393').

[3] The plaintiff's claim against the defendant is for outstanding service charges, contribution to the sinking fund, quit rent, insurance and late payment interest (collectively referred to as the 'management charges/management fund'). The amount claimed is for the accumulated arrears from the date of the incorporation of the plaintiff ie on 21 April 2008 until 4 March 2016.

[4] Vide the statement of claim, the plaintiff pleaded that from 21 April 2008, the defendant's contribution to the management fund is RM0.15 per sqft and as from July 2012, the rate payable by the defendant is RM0.20 per sqft.

[5] The defendant did not dispute the rate of contribution as stated by the plaintiff. The pleaded defence is that there is no outstanding amount due to the plaintiff as the defendant had made the necessary payments.

[6] The defendant denied owing the plaintiff the amount claimed on two other grounds, namely that the plaintiff had no locus standi to claim against the defendant and that in any event, the claim is statute barred.

PROCEEDINGS IN THE HIGH COURT

[7] Tan Kim Chooi ('PW1'), the plaintiff's immediate past chairman and a committee member testified, inter alia, that the contributions payable by the defendant was initially at RM0.15 per sqft and later increased to RM0.20 per sqft.

[8] These rates were decided by the MC of Plaza 393 pursuant to the resolutions made by the plaintiff at its first and fourth AGM respectively. These resolutions, according to PW1 were recorded in the minutes of the AGMs ('the minutes'). Both the resolutions and the minutes were however not produced in court.

[9] The plaintiff's claim as testified by PW1, its sole witness, is based on the plaintiff's statements of account, which PW1 is not the maker. The primary or supporting documents such as the invoices, the debit notes or credit notes were not produced in court.

[10] For the defendant, the crux of its case is that it has paid all the maintenance charges or contribution to the management fund. The defendant relies heavily on the agreement dated 19 July 2011 ('the agreement') which was signed by the director of the defendant and the plaintiff's previous chairman, Mr N Madhavan.

[11] Clauses 2 and 3 of the agreement read:

2.0 ESSB'S OBLIGATIONS

2.1 ESSB will at its own cost and expenses manage, maintain and contribute towards the services charges on all those common area relating to the Retail Area (hereinafter referred to as 'the ESSB Common Area').

2.2 It is hereby agreed and understood that the MC is not obliged to manage and maintain the ESSB Common Area and neither is the MC obliged to contribute any service charges whatsoever towards the ESSB Common Area.

2.3 It is further agreed that ESSB shall contribute Ringgit Malaysia One Thousand Five Hundred (RM1,500-00) only on a monthly basis towards the maintenance fund of MC towards the common area to both parties.

3.0 MC OBLIGATIONS

3.1 MC will at its own cost and expenses manage, maintain and contribute towards the service charges on all those common area other than the ESSB Common Area (hereinafter referred to as 'the MC Common Area').

3.2 It is hereby agreed and understood that the ESSB is not obliged to manage and maintain the MC Common Area and neither is the ESSB obliged to contribute any service charges whatsoever towards the MC Common Area.

[12] It is also the defendant's case that in or around September 2012, the plaintiff and the defendant agreed that the defendant's monthly contribution be increased from RM1,500 per month to RM2,000 per month. In accordance with the agreement, the defendant had settled its monthly contribution. Thus the defendant takes the position that there is no amount outstanding to the plaintiff.

[13] PW1 denied any knowledge of the agreement. He stated that the agreement was never brought to the attention of the plaintiff until the filing of this action.

[14] The High Court was called upon to determine the following issues:

(a) whether the plaintiff is entitled to collect the maintenance charges from the defendant;

(b) whether the agreement is applicable;

(c) whether the plaintiff's claim is barred by limitation; and

(d) whether the plaintiff is entitled to collect interest for late payment at the rate of 10%pa.

Whether the plaintiff is entitled to collect the maintenance charges from the defendant

[15] The learned trial judge considered ss 41A, 45 and 52 of the STA and ruled that the defendant has a legal duty to pay the plaintiff the outstanding maintenance charges as claimed by the plaintiff. For ease of reference we reproduce the provisions below:

41A Determination of contribution payable during initial period.

(1) Where the first annual general meeting of a management corporation has not yet been convened, the proprietor of the parcels of provisional blocks, if any, in the subdivided building or land, whichever, is applicable shall, commencing from the opening of the book of the strata register, pay to the

management corporation any sum determined by the original proprietor as the contribution payable by the proprietors to the management fund of the management corporation.

45 Management fund.

(1) The management corporation shall establish a management fund sufficient in the opinion of the management corporation to meet the administrative expenses as may be incurred for the purposes of controlling, managing and administering the common property, paying rent, rates and premiums of insurance and discharging any other obligation of the management corporation.

(2) ...

(3) Subject to section 41A, for the purpose of establishing and maintaining the management fund, the management corporation may at a general meeting —

(a) determine from time to time the amount to be raised for the purposes mentioned in subsection (1);

(b) raise the amounts so determined by levying contributions on the proprietors in proportion to the share units or provisional share units of their respective parcels or provisional blocks; and

(c) determine the amount of interest payable by a proprietor in respect of late contributions which shall not exceed the rate of ten per cent per annum.

(4) On application by or on behalf of a person who is proprietor of a parcel, or by or on behalf of a prospective purchaser of a parcel that is offered for sale, or by or on behalf of the charge or prospective chargee of a parcel, the management corporation shall issue to that person a certificate certifying —

(a) the amount determined, pursuant to subsection (3), as the contributions of that proprietor;

(b) the time and manner of payment of the amount determined by it pursuant to that subsection;

(c) the extent, if any, to which the contribution has been paid;

(d) the amount (if any) then recoverable by the management corporation in respect of the parcel pursuant to subsection (5) of section 43;

(e) ...

(f) ...

(5) Any contribution levied under subsection (3) in respect of a parcel shall be due and payable on the passing of a resolution to that effect by the management corporation and in accordance with the terms of that resolution, and may be recovered as a debt from the proprietor of, or the successor in title to, the parcel.

52 The recovery of sum as debt due to management corporation.

(1) The payment of any amount lawfully incurred by the management corporation in the course of the exercise of any of its powers or functions

or carrying out of its duties or obligations shall by virtue of this section be guaranteed by the proprietors for the time being constituting the management corporation, each proprietor being liable under such guarantee only for such portion of the money so incurred as the share units of his parcel or the provisional share units of his provisional block bear to the aggregate share units.

(2) Where any proprietor has not discharged or fully discharged his liability for the purpose of subsection (1), the management corporation shall be entitled to recover from the proprietor in any court of competent jurisdiction as a debt due to it.

(3) Where for reasons of insufficiency of fund to meet the sum guaranteed under subsection (1), the management corporation may at an annual general meeting or at an extraordinary general meeting determine the amount to be contributed by each proprietor and decide any other issue or matter relating to the settlement of the said sum.

[16] Notwithstanding the non-production of the relevant resolutions and the Minutes, the learned trial judge accepted the sworn testimony of PW1 that the contributions at the rate of RM0.15 per sqft and the increased rate of RM0.20 per sqft were decided by the MC of Plaza 393 pursuant to the resolutions made by the plaintiff at its first and fourth AGM accordingly.

[17] Her Ladyship also accepted the statements of account as proof of the arrears payable by the defendant. The learned trial judge opined that there is no necessity for the plaintiff to produce the invoices, debit notes and credit notes since the numbers of these invoices and notes are computer-generated and they appear in the plaintiff's statements of account. In this regard, the learned trial judge made a finding of fact that the defendant had received all of the plaintiff's statements of account.

[18] The learned trial judge also noted that the plaintiff's statements of account have been agreed by both parties as Part B documents in the common bundle of document (CBOD) which the defendant cannot now dispute. As to the truth of the contents, the learned judge found that other than relying on the agreement, the defendant has not disputed the statements of account prior to the filing of this action.

[19] The learned trial judge agreed with the defendant that the plaintiff had no locus standi to claim for outstanding maintenance charges before the plaintiff's incorporation on 21 April 2008. In fact, the plaintiff had in the course of the trial abandoned its claim for the sums prior to 21 April 2008.

Whether the agreement is applicable

[20] The defendant contends that pursuant to the agreement, the defendant would maintain its own ESSB common area at its own cost and expenses, whilst the plaintiff maintains the MC's common area at its own cost and expenses. The defendant is not liable to contribute to the maintenance charges for the areas not maintained by it and is also not liable to pay according to the rate determined by the plaintiff, as payable by the other proprietors. The defendant's position is that under the agreement, it is only required to pay the amount agreed upon.

[21] The learned judge found that the agreement is void and unenforceable essentially on the grounds that parties cannot contract out of statutory requirements and that the agreement is unlawful under s 24 of the Contracts Act 1950 as the consideration or object of the agreement is forbidden by the STA, in particular it runs contrary to the framework of ss 41A and 45 of the STA.

[22] The learned judge also found the agreement not applicable and unenforceable for the following reasons:

(a) the burden is on the defendant to prove that the agreement was approved by the plaintiff at its AGM which the defendant failed to do;

(b) the defendant did not call any witness or adduce any evidence to confirm that the agreement was approved by the plaintiff in an AGM;

(c) merely showing that the agreement was signed by the plaintiff's previous chairman is not good enough;

(d) the internal management rule or the *Turquand*'s rule where the defendant may presume that all internal processes and rules of the plaintiff were complied with, cannot apply when there are express statutory provisions on how maintenance charges ought to be levied by a MC; and

(e) the agreement is without an expiry date and a termination date and is against public policy as the defendant cannot be allowed to pay in perpetuity the rates outside the framework of the STA.

[23] Without the agreement, the learned judge held that the defendant, as the proprietor of the seven parcels is required to pay the outstanding maintenance charges at the same rate as all the other proprietors of Plaza 393.

Whether the plaintiff's claim is barred by limitation period

[24] Under s 6(1) of the Limitation Act 1953, the action founded on contract shall not be brought after the expiration of six years from the date

when the cause of action accrues. In this regard, the defendant submitted that the plaintiff was formed on 21 April 2008 whereas the plaintiff's claim was from 21 April 2008. The plaintiff's action filed on 15 March 2016 ie after the expiration of six years from the date on which the cause of action accrued, is time-barred.

[25] Relying on *Sri Wangsaria Management Corporation v Yeap Swee Oo @ Yeap Guan Cheng & Anor; Veronica Leong Poh Geok v Lim Cheng Poh* [2009] MLJU 1461; *Gulamabbas bin Mohamed Hussain v Bonus Properties Sdn Bhd & Anor* [2015] MLJU 2046; [2015] 1 LNS 1073 and *Malayan Banking Bhd v Wembley Industries Holdings Bhd* [2012] MLJU 91; [2012] 5 CLJ 956, the learned judge found that the plaintiff's statements of account are running accounts as whatever maintenance charges that were not paid by the defendant were carried forward by the plaintiff to the subsequent months. The plaintiff's claim is therefore not time-barred under the Limitation Act 1953.

[26] Her Ladyship noted that in any case, the defendant had made part payment of the maintenance charges on 12 August 2013 and 6 September 2013 which was acknowledged by the plaintiff on 27 October 2015. Section 26(2) of the Limitation Act 1953 therefore applies in that the cause of action accrues on and not before the date of acknowledgment of the payment.

Whether the plaintiff is entitled to collect late payment interest of 10%pa

[27] The learned judge found that under s 45(3) of the STA, the plaintiff may determine the amount of interest payable by a proprietor in respect of the contribution which shall not exceed the rate of 10%pa. From the evidence adduced, the learned judge found that the defendant has failed to pay the outstanding maintenance charges. Therefore, the plaintiff is justified in applying for pre-judgment interest for late payment of the defendant's contribution of maintenance charges at a rate of 10%pa, as permitted by the STA.

[28] On the above considerations, the learned trial judge found that the plaintiff has proved its claim on a balance of probabilities. Judgment was thus entered against the defendant. Aggrieved, the defendant appealed to this court.

THE APPEAL

[29] Parties had submitted extensively both oral and written on the issues raised in the appeal. For brevity, we do not propose to repeat what had been submitted except to state that to our minds, the appeal revolves around two main issues.

A **[30]** The first main issue is whether the plaintiff has proved its claim for the maintenance charges. Related to this would be the sub-issues of non-production of the resolutions; the reliance on the statements of account; the issue of limitation and the validity of the agreement.

B **[31]** The second main issue is whether the plaintiff's claim based on the area or square foot instead of the share unit is in contravention of the STA. The pertinent question to be answered as regards the second issue is whether we could entertain this new issue raised by the defendant that the sums claimed by the plaintiff were illegal as being contrary to law, when this point was not C pleaded in the defence and not raised in the proceedings in the High Court.

[32] Before we proceed with the main issues, we wish to state at the outset that we find no appealable error in respect of the learned judge's finding that the plaintiff's claim is based on a running account. In *Wembley Industries Holdings* D *Bhd*, it was held:

> ... a running account is a single account and not a composite of its various parts. A payment made on account of a running account is in respect of the entire outstanding balance, with the result that time is extended for the whole of the debt. It appears, therefore that a running account will become statute-barred only if more E than six years elapse between the supply of the last article under it and the last payment on account.

[33] Consequently, we agree with the learned judge that the plaintiff's claim F is not barred by limitation under s 6 of the Limitation Act 1953. We also agree that s 45(3)(c) of the STA allows the plaintiff to charge and claim interest of 10%pa for the late payment of the maintenance charges.

[34] We further agree with the learned judge's finding on the issue of the G validity of the agreement. Under the agreement, the plaintiff is not obliged to manage and maintain the common areas relating to the retail area ('ESSB Common Area'). It is the defendant who will, at its own cost and expenses manage, maintain and contribute towards the service charges on all ESSB Common Area. Under the agreement too, the defendant is not obliged to pay H maintenance charges of the common area of the residential parcels, which the defendant had no access to. Pursuant to the agreement, the defendant shall only contribute the sum of RM1,500 per month towards the maintenance fund of the plaintiff for the common area that is common to both the parties, excluding the ESSB common area.

I **[35]** The agreement if upheld would result in a different common property being managed by the plaintiff and the defendant respectively. The defendant in this instance would act as if it is a management corporation under the STA or the Strata Management Act 2013 ('the SMA'). The defendant also need not

contribute to the management fund as the other proprietors. These would run counter to the statutory regime of the STA/SMA which does not envisage a strata development having multiple common areas or having more than one management corporation. Neither does the STA/SMA envisages exempting certain proprietor from paying the maintenance charges or making contribution to the maintenance fund as resolved by the management corporation in its AGM.

[36] The learned judge found that the consideration or object of the agreement is forbidden by STA and if permitted, would defeat the purposes of ss 41A and 45 of the STA. Suffice to state that Her Ladyship's finding is supported by the authorities, in particular, the judgment of this court in *Perbadanan Pengurusan Endah Parade v Magnificient Diagraph Sdn Bhd* [2013] 6 MLJ 343; [2014] 5 CLJ 881 where Mohamad Ariff Yusof JCA said at pp 360–361 (MLJ); p 903 (CLJ):

> In this respect, we agree with the proposition advanced by the respondent that the management corporation as a body incorporated under statute can only levy payments which are mandated by the statute. It will be ultra vires its powers for management corporation to levy payments which are not sanctioned by the statute. This is where a proper interpretation of s 45 of the STA becomes of fundamental importance. Section 45(1) states very clearly that the management corporation 'shall establish a management fund sufficient in the opinion of the management corporation to meet the administrative expenses as may be incurred for the purposes of controlling, managing and administering the common property, paying rent, rates and premiums of insurance and discharging any other obligation of the management corporation'. This is a very comprehensive provision.

[37] Her Ladyship's finding is also consistent with the views of Teo Keang Sood, the learned author of *Strata Titles in Singapore & Malaysia* (3rd Ed) where he states at p 495:

> Firstly, it is trite law that a body created by a statute only has powers granted expressly or by implication in that statute. A management corporation's power to raise contributions is clearly and exhaustively provided for in s 42 of the LTSA (the Land Titles (Strata) Act, Singapore). Anything done outside these powers is void ab initio. Secondly, upholding contracts which circumvent the detailed and carefully drafted provisions of the LTSA would drive a coach and horses through it.

And at p 497:

> If parties are permitted to contract out of the legislative framework of the BMSMA (the Building Maintenance and Strata Management Act 2004) for reasons best suited to them, one can imagine the chaos and confusion which can result. Not only would a management corporation contract to absolve itself of its duties under the BMSMA, it would have a free hand in raising contributions which may be inimical to the interests of subsidiary proprietors in a strata scheme.

[38] As such we affirm the learned judge's finding that the agreement is unenforceable. And in light of the above considerations, the fact that there was no proof of any resolution or certificate to authorise the plaintiff to enter into the agreement with the defendant is of no consequence.

Whether the plaintiff has proved its claim

[39] In concluding that the plaintiff has proved its claim against the defendant on the balance of probabilities, the learned judge made, inter alia, the following findings of fact:

(a) that the defendant had never paid the maintenance charges for the seven parcels owned by the defendant since 21 April 2008 until to date in the sum of RM65,928.65 per month or, since 2012, RM87,904.92 per month;

(b) that there was no written dispute or any dispute at all in respect of the plaintiff's letter of demand for the sum of RM9,785,197.97 as at 31 October 2015 in which the statement of account of the plaintiff was attached to the said letter of demand;

(c) that the statements of account at CBOD Pt B pp 72–73, 76, 79 and 83 which are the defendant's exhibits were received by the defendant;

(d) that the defendant had also received the statements of account as at 31 October 2015;

(e) that Note 5 or 6 of the statements of account stated that in case of any dispute the defendant is required to file a written dispute with the MC office within 30 days, failing which the statements are accepted and deemed correct;

(f) that since the defendant had never filed a written dispute with the plaintiff, the defendant had accepted the plaintiff's statements of account as correct; and

(g) that there is no proof on record that the defendant has paid the plaintiff the maintenance charges as claimed.

[40] It was the submission of learned counsel for the defendant that the statements of account do not amount to proof of debt of the amounts stated therein. Reliance was placed on the following cases:

(a) *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627;

(b) *Mackt Logistics (M) Sdn Bhd v Malaysian Airline System Bhd* [2014] 2 MLJ 518;

(c) *Chip Lam Seng Enterprise Bhd (in liquidation) v Euphoria Technologies Sdn Bhd & Anor* [2017] 10 MLJ 796; [2017] 1 CLJ 195;

(d) *Lim Tze Sian v Coverright Surface Malaysia Sdn Bhd* [2017] 1 MLJ 418;

(e) *Sampo Materials (M) Sdn Bhd v Tenaga Nasional Bhd* [2016] 1 MLJ 375; and

(f) *Bank of New South Wales v Brown (Official Liquidator of Tom The Cheap (WA) Pty Ltd)* (1983) 45 ALR 225.

[41] On the statements of account being placed in Part B of the CBOD, *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229 was cited where this court held that even if the authenticity of the statements was not called into question, it is still incumbent upon the party who tendered the statements to prove their contents.

[42] It was thus argued for the defendant that although the statements of account were placed in Part B of the CBOD, the plaintiff is nonetheless required to prove the contents of the statements either by calling the maker of the statements or another witness who is able to explain the details of the amounts listed in the statements of account. PW1 was neither the maker nor had any knowledge or ability to explain the amounts in the statements of account.

[43] In response, learned counsel for the plaintiff submitted that the defendant did not challenge the statements of account in the High Court. DW1 admitted in evidence that the defendant had received the statements of account and the defendant's witnesses also conceded that the defendant had never written to the respondent to dispute the statements of account. The contemporaneous documents similarly show that the statements of account were received and never disputed by the defendant. The learned judge was thus correct in her findings as regards the statements of account. Relying on *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233; [1996] 2 CLJ 611 and *Mega Pascal Bhd v Tajukon Sdn Bhd & Ors* [2011] MLJU 1450; [2011] 1 LNS 691, the plaintiff further contends that the defendant is now estopped from disputing the validity of the statements of account.

Whether the claim based on area/square foot is illegal

[44] The argument for the defendant is that in contravention of the STA, the plaintiff failed to quantify its claim on a share unit basis and instead quantified its claim on a per square foot basis. The argument is premised on s 45(3)(b) which provides that contributions are levied on the proprietors in proportion to the share units or provisional share units of their respective parcels or provisional blocks. Section 52 is also relied upon by the defendant to contend that a parcel proprietor is only liable for monies incurred by the management corporation in accordance to the share unit of the proprietor's parcel.

[45] To support his argument, learned counsel cited *KCP Management Corporation v Potensi Naga Sdn Bhd* [2013] MLJU 1633; [2013] 1 LNS 1030; *Malaysia Land Properties Sdn Bhd & Anor v Simesilk Sdn Bhd* [2014] MLJU 1904; [2014] 7 CLJ 1117; *MC Strata Title No 980 v Yat Yuen Hong Co Pte Ltd & Anor* [1993] 1 SLR 555 and the textbook *Strata Title in Singapore and Malaysia* (5th Ed, LexisNexis, 2015).

[46] As stated earlier, this point was not pleaded by the defendant and neither was it canvassed in the High Court. Learned counsel for the defendant submitted that this court possesses the discretion to hear and determine points which are raised on appeal, even if such points were not raised at the trial and that the court is bound to take notice of illegality even if it is raised for the first time on appeal. The following are the authorities relied upon by the defendant: *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517; *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; and *Hee Cheng v Krishnan* [1955] 1 MLJ 103.

[47] In response, learned counsel for the plaintiff cited *Malaysia Land Properties Sdn Bhd v Waldorf & Windsor Joint Management Body* [2014] 3 MLJ 467; *Haji Ali bin Haji Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29; [2003] 3 CLJ 310 and *Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd* [2017] 2 MLJ 697; [2017] 4 CLJ 1 to submit that the defendant is precluded from raising this issue as a point of law as it has not been pleaded nor raised in evidence in trial. The issue was also not dealt with in the defendant's submission before the learned judge and neither was this issue stated in the memorandum of appeal.

[48] It was further submitted for the plaintiff that in any event, there is no merit in the contention of the defendant that the levy based on a square foot basis instead of a share unit basis is wrongful because:

(a) the governing provisions on the contributions to be paid by parcel owners is ss 45(1), (3) and (5) of the STA;

(b) s 45(3) employs the word 'may' and does not make it mandatory for the contributions to be levied on a share unit basis;

(c) the levying of contributions on a square foot basis under the STA is common and has been recognised without reservation by our courts in *Medical Office Management Corporation Block v Parkway Life Malaysia Sdn Bhd* [2015] 10 MLJ 332; [2015] 1 CLJ 264; *Hean Sang Sdn Bhd v Kompleks Yik Foong Management Corporation* [2015] MLJU 2344; [2015] 5 CLJ 93 and *D2D Management Services Sdn Bhd v Permata Alasan (M) Sdn Bhd* [2014] MLJU 1905; [2014] 1 LNS 1486;

(d) s 45(3) empowers the general meeting of the plaintiff to decide upon the manner of determining the charges payable by parcel owners and the defendant was represented at the first AGM when the rate of RM0.50 per sqft was determined and made no objection to the rate;

(e) the charges levied against the defendant in accordance with the resolution at the AGM are thus not in contravention of the STA; and

(f) the defendant has not placed any authority before the court that makes it mandatory for the rate to be on a share unit basis.

Our findings

[49] It is an established principle of law that an appellate court will not readily interfere with the findings of fact arrived at by a trial court to which the law entrusts the primary task of evaluation of the evidence. Only where a trial court has so fundamentally misdirected itself that an appellate court has a duty to intervene (see *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163).

[50] The principle is reiterated in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453, where Azhar Mohamed FCJ said at p 473 (MLJ); p 458 (CLJ):

> It is trite that an appellate court would be slow to disturb a trial court's findings of facts in the absence of any perverse and unwarranted finding on the totality of the evidence before it. The cases of *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113; *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 and *Lim Kim Chet & Anor v Multar bin Masngud* [1984] 2 MLJ 165 are some of the authorities to support the cardinal principle that an appellate court should be slow in interfering with a finding of fact of the trial court which had observed the demeanour and heard the witnesses before coming to its conclusion.

Whether the plaintiff has proved its claim

[51] According to PW1, the plaintiff passed resolutions at the plaintiff's first AGM to levy the contributions at a rate of RM0.15 per sqft and at the delayed fourth AGM when the plaintiff endorsed the increased rate of RM0.20 per sqft. These resolutions were not produced in court. PW1 stated that they were in the minutes but the minutes were likewise not produced during trial. The learned judge accepted the oral evidence of PW1.

[52] The plaintiff based its claim on the statements of account. No invoices,

A debit notes or credit notes were tendered to support the amount in the statements of account. The learned judge held that the statements of account are sufficient proof of the sums owed by the defendant and that there is no necessity for the plaintiff to produce the invoices, debit notes and credit notes since the numbers of these invoices and notes are computer-generated and they
B appear in the plaintiff's statements of account.

[53] The learned judge alluded to the fact that the statements of account have been agreed to by both parties as Part B documents in the CBOD. Thus the authenticity of these documents cannot now be disputed by the defendant.
C As to the truth of the contents of these documents, other than the agreement (which the defendant is not allowed to rely), the defendant has not disputed the statements of account prior to the filing of this action. As mentioned earlier, the learned judge made a finding of fact that the defendant had received the
D statements of account and had never disputed the accuracy of the statements. Thus the learned judge found that it is highly probable that the contents of the statements of account are true and correct.

[54] Further, by the fact that the plaintiff had received some part payment of
E the maintenance charges from the defendant, the learned judge held that the plaintiff is not estopped from asserting its legal rights in claiming for the balance of the outstanding sums owed by the defendant.

[55] Having considered the respective submissions and having perused the
F authorities, we find on the facts, no compelling reason to depart from the finding of the learned judge. It is within the domain of the learned judge whether to accept or to reject the evidence of PW1 and in the instant case Her Ladyship had accepted the evidence of PW1.

G

[56] The learned judge was not plainly wrong in concluding that since the defendant had never filed a written dispute with the plaintiff, the defendant had accepted the plaintiff's statements of account which are all deemed correct by the defendant. The conclusion of the learned judge is not perverse. It is
H consistent with Note 5 or 6 of the statements of account, as the case may be, which states:

> in case of any disputes please file a written dispute with the Management Office within 30 days from the date of this statement. Without a written dispute filed within 30 days, the statement is accepted from you and deemed correct.

I

[57] We are similarly of the view that having received the statements and having failed to deny or dispute them despite the express requirement to do so, it is too late in the day for the defendant to now challenge the statements of account. It must be emphasised that even at the point of time when this claim

was filed, the defendant did not take the position that the computation of the amount claimed is erroneous. The position taken as pleaded in the statement of defence is that the plaintiff and the defendant had entered into an agreement and pursuant thereto, the defendant is not liable to pay the maintenance charges claimed but is only liable to pay what was agreed upon. We therefore uphold the learned judge's acceptance of the oral evidence of PW1 and the statements of account as proof of the amounts due from the defendant.

Whether the claim based on area/sqft is illegal

[58] It is in evidence before the High Court and not disputed by either party that the plaintiff did levy contributions on the defendant on a square foot basis whereas s 45(3) of the STA provides for levy of the contribution on a share unit basis.

[59] Whether or not the plaintiff has contravened the STA by levying the contributions on the basis of a square foot instead of a share unit is a question of law.

[60] In *Lim Geak Liang*, the Federal Court quoted with approval the following passage from *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473:

> When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea.

[61] In *Luggage Distributor*, this court said at p 739:

> ... the categories of cases in which an appellate court will admit a new point are not closed. The governing principle is this: an appellate court will permit a new point to be raised for the first time before it where the interests of justice so require. The question whether the interests of justice are met in a particular case depends on the peculiar facts of that case. The factors for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.

[62] While in *Hee Cheng*, Thomson J stated at p 103:

> I am not overlooking the point that this question of the contract being unlawful has not been specifically pleaded. There are obvious reasons why it was not pleaded. The defendant has subsequently entered into a similar sort of transaction and no doubt it did not lie in his mouth to plead its illegality. Nevertheless, to my mind, it is well settled law that when a question of this sort arises clearly on the evidence 'it is the duty of the court when asked to give a judgment which is contrary to a statute to take the point although the litigants may not take it' (see *Philips v Copping*).

[63] In a more recent case of *Bank Bumiputra Malaysia Bhd v Emas Bestari Sdn Bhd and another appeal* [2014] 2 MLJ 49 this court stated the principle in the following terms:

> ... if the matter raised is only a question of law, it need not be pleaded. Even if the matter is a question of fact, but the evidence relied upon in respect of it are already admitted in evidence before the court, which means the other party is not taken by surprise. Protestations or affectations of surprise 'because it was not pleaded' in such case holds no merit. Only if it is shown that the matter raised relied upon facts not pleaded and therefore the party making the objection did not have the opportunity of addressing the truth and accuracy of description of that fact, may the objection hold merit and be sustained.

[64] In the instant appeal, no injustice will be occasioned to the plaintiff if the point of illegality is allowed because it does not involve any new evidential material for its determination. The plaintiff had placed much reliance on the statutory framework of the STA pertaining to the agreement. Whether or not the plaintiff's claim based on square foot is illegal also concerns the statutory framework of the STA. In particular, both the agreement and the point of illegality concerns s 45 of the STA. Section 45 was considered by the High Court. These factors, in our view weigh in favour of the defendant for admission of this new point.

[65] Further, the question of illegality which question does not depend on pleading or procedure, strikes at the heart of the plaintiff's claim. As stated in *Luggage Distributors*, the justice of a case will ordinarily lie in favour of permitting a plea of illegality to be taken for the first time on appeal because it is unjust that a party who has broken the law should succeed. Authorities are also replete that when an allegation of illegality is made, notwithstanding the fact that illegality is not pleaded, the court is bound to take cognisance of it (see *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161; *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457; *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281; [1992] 1 CLJ Rep 173 and *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212).

[66] Applying the established principles, the defendant therefore ought to be given the liberty to canvass the issue whether the plaintiff's claim premised on a square foot instead of a share unit is illegal for being in contravention of the STA, notwithstanding that such issue was not pleaded nor raised in the High Court.

[67] It was submitted for the plaintiff that the charges levied on a square foot basis are not wrongful because it is not mandatory that the charges be imposed

on a share unit basis. Learned counsel for the plaintiff highlighted that s 45(3) of the STA employs the word 'may'.

[68] If the plaintiff's argument is accepted, it would mean that the MC is conferred the discretion to charge the parcel owners either on a square foot or on a share unit basis. This will result in two different basis of levy of the maintenance charges on parcel owners. In our view, it cannot be that the STA intended MC to charge parcel owners on a different basis, but rather the law intended that there be only one basis for the quantum of contribution to the MC to be determined and that is on the basis of share unit.

[69] At this juncture, it is pertinent to highlight other provisions of the STA which made mention of the share unit.

[70] Section 4, the interpretation section of the STA states: "share units' in respect of a parcel, means the share units determined for that parcel as shown in the schedule of share units'. Section 18 of the STA provides: 'Every parcel shall have a share value as approved by the Director and expressed in whole numbers to be known as share units'. While s 36 reads:

> ... The share units of a parcel or the provisional share units in the case of a provisional block, as specified in the strata title or in the provisional strata title, as the case may be, shall determine —
>
> (a) the voting rights of the proprietors;
>
> (b) the quantum of the undivided share of each proprietor in the common property; and
>
> (c) the proportion payable by each proprietor of the contribution levied by the management corporation pursuant to section 45, 63 or 66.

[71] Section 52 of the STA also refers to the share unit where it provides:

> ... each proprietor being liable under such guarantee only for such proportion of the money so incurred as the share units of his parcel or the provisional share units of his provisional block bear to the aggregate share unit.

[72] It is clear, particularly by reference to s 36(c) of the STA, that there is an express statutory provision on how the maintenance charges should be calculated. It is the share unit that should form the basis of the proportion payable by the defendant of the maintenance charges. The levy based on the area or square foot is not provided for under the STA.

[73] In this respect, it is worthy to quote the following passage in *Strata Title in Singapore and Malaysia* (5th Ed) on the importance of share value or share unit entitlements:

A [12.02] Under the LTSA, BMSMA and the STA, the share value/share units of a proprietor's lot/parcel or provisional lot/block, as the case may be, are of considerable importance as they determine the following:

(1) ...

B (2) ...

(3) the amount of contributions levied by the management corporation and payable by each proprietor;

C **[74]** One other point on s 45 of the STA. In supporting the learned judge's finding that the statutory requirements under s 45 cannot be waived by the agreement, learned counsel for the plaintiff cited *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, where Viscount Radcliffe stated at p 1015:

D The respondent had invoked in support of its defence a principle which appears in our law in many forms, that a party cannot set up an estoppel in the face of a statute. Thus a corporation upon which there is imposed a statutory duty to carry out certain acts in the interest of the public cannot preclude itself by estoppel in pais from performing its duty and asserting legal rights accordingly. ... Given a 'statutory obligation of an unconditional character' it is not open to the court to allow the E party bound by that obligation to be barred from carrying it out by the operation of an estoppel. Similarly, there is, in most cases, no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction upon which he is being sued, despite the fact that by conduct or other means he would otherwise be bound by estoppel.

F **[75]** By the same token, where the plaintiff's claim is illegal for being in contravention of the STA, estoppel cannot be raised against the defendant notwithstanding the fact that the defendant's representative was present at the first AGM and had not objected to the rate levied on the basis of square foot.

G **[76]** Finally, in the cases cited by learned counsel for the plaintiff to support his argument that the levying of contributions on a square foot basis had been recognised by the courts without reservation, we noted that there was no challenge mounted in those cases that such levy was in contravention of the H STA.

CONCLUSION

I **[77]** This court in *Endah Parade* held that a management corporation can only levy payments which are mandated by the statute and that it will be ultra vires its powers for the management corporation to levy payments which are not sanctioned by the statute. Similarly in the instant case, we find that the STA mandated that contributions to the management fund be determined on a share unit basis. Any other basis to determine the quantum of contribution

would be contrary to the STA and thus illegal. The fact that the charges levied on the square foot basis are in accordance with the resolutions passed at the plaintiff's general meeting is immaterial, given that the plaintiff cannot act beyond the provisions of the STA.

[78] We are therefore constrained to rule in favour of the defendant on the second main issue. And on this ground, the appeal has to be and is hereby allowed with costs. We do not think that the plaintiff would in any event be prejudiced by our finding on illegality. As we had earlier found that the plaintiff's claim is not barred by limitation for the reason that the maintenance charges are on a running account, the plaintiff would be at liberty to claim the arrears due from the defendant, at whatever rate determined by the general meeting, on a share unit basis.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor